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JAMES B. McKENNEY,
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No. 194

Brief

Supreme Court of the United States

WILLIAM DUGALD STEWART, an alien and subject of the Queen of Great Britain, resident in England,
Plaintiff in Error.
(Plaintiff below.)

vs.

CITY OF EASTON AND COUNTY OF NORTHAMPTON, corporations incorporated under the laws of the State of Pennsylvania, and CITIZENS of the said State resident in the Eastern District of Pennsylvania,
Defendants in Error.

October Term, 1897.

No. 197.

ARGUMENT FOR DEFENDANTS IN ERROR.

It is sought to convict the Court below of error in its construction of the deed for the property in controversy. The Court below held that it did not create an estate upon condition, but an absolute estate in trust, and one in which the plaintiff had no interest.

The action is in ejectment and therefore the burden rests upon the plaintiff to clearly prove his title. He seeks to do this by offering in evidence deed marked Exhibit No. 4, (transcript of record, page 16), and relying upon the language of the habendum to create an estate upon condition. The habendum is as follows:

"To Have and to Hold the said hereinbefore described lot of ground with the appurtenances unto the said John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse, their heirs and assigns forever. In trust nevertheless to and for the erecting thereon a court house for the public use and service of said county, and to and for no other use, intent or purpose whatsoever, to be holden of us, our heirs and successors, proprietaries of Pennsylvania, as of our manor of Fermor, in the County of Northampton aforesaid, in free and common socage by fealty only, etc." The deed was dated September 28, 1764. The County of Northampton was created by Act of Assembly passed March 11, 1852, (transcript of record, page 9), which authorized certain persons to purchase land in trust to erect a court house thereon, Section 6 of which was as follows, viz: "That it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs of a piece of land, situate in some convenient place in the said town, in trust, and for the use of the inhabitants of the said county, and thereon to erect and build a court house and prison sufficient to accommodate the public service of the said county and for the ease and conveniency of the inhabitants." (See transcript of record, page 14.) The warrant (see page 14 of transcript), which preceded the deed in question and is referred to in the deed, contained the following recital: "Whereas in and by an Act of General Assembly of this province entitled An Act of erecting the northwest part of Bucks into a separate county, which in and by the said Act is called Northampton, and Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, were appointed trustees to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the town of Easton, in the said county, and thereon to erect and build a court house and prison sufficient to accommodate the

public service of the said county, and for the ease and convenience of the inhabitants, as in and by the said Act appears. And whereas, on application and request of the said trustees, and out of our regard to encourage and promote the improvement of the said town and general good and convenience of the inhabitants of the said county, we have condescended and agreed to grant the said trustees a lot or piece of ground of eighty feet square to be laid out in the centre of the great square in the middle of the said town of Easton for a court house for the use and the accommodation of the inhabitants of the said town and county forever."

It will be observed that the deed to the trustees follows strictly the language of the Act of Assembly authorizing the trustees to make the purchase, and, so far as the trustees are concerned, it conveys to them a fee simple. It conveys the ground to the trustees by name, "their heirs and assigns forever." The subsequent clause, "In trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county, and to and for no other use, intent or purpose whatsoever," was intended to apply only as between the trustees and the people of the county and not between the Penns and the people of the county. The Penns parted with their entire title, and the language quoted is not a qualification of the estate as granted, but simply limits the uses to which it might be applied in the hands of the trustees. It contains no language which imports that the grant shall be void in case the purpose for which the land is conveyed is not carried out. Nor does it reserve to the grantors and their heirs the right in that event to re-enter on the land and resume possession of it as of their former estate. Moreover the purpose declared is in its nature general and public, and not inuring specially to the benefit of the grantor. It simply defines a duty of the trustees to the county, not to their grantors. As between the grantors and the trustees, it conveys a

fee simple, and between the trustees and the people of the county it creates a trust.

"Where the intention is to dedicate property to charitable uses, there is a difference between a conveyance *on condition* and a conveyance in trust. In the first case the grantor and those claiming under him may enter for condition broken. But in the last they cannot, and the proper remedy for an abuse of the trust is an application to the chancery powers of the court for an appointment of new trustees, or the means of compelling those already appointed to execute the trust according to the intention of the donors."

Barr vs. Weld, 24 Pa. St., 86.
Dillon on Mun. Corp., § 653.

Where subsequent conditions are relied on to work a forfeiture, they must be created by express terms or clear implication, and are construed strictly.

2 Washb. on Real Prop., 447.
American & English Ency., Vol. 13, p. 777.

The policy of the law is to render the alienation and transfer of land as free as possible, and conditions are not favored in law. Therefore, whenever words can be construed either as a condition, reservation or covenant, the tendency of the Courts is to construe them as one of the latter, rather than as the former.

Paschall vs. Passmor, 15 Pa. St., 295.
Church vs. Ground Co., 103 Pa. St., 613.

We contend first that the deed was an absolute conveyance to the county.

In construing a deed the Court places itself as nearly as possible in the situation of the contracting parties; and their intent will be ascertained in the same manner as in the case of any other contract. If the intention is not then apparent from the deed, resort is to be had to the rules of construction which give

greater effect to these things about which the law presumes the parties are least liable to make a mistake.

Paschall vs. Passmore, supra.

3 Washb' on Real Prop., 384.

In Seebold vs. Shitler, 34 Pa. St., 133, an Act of Assembly authorized the Commissioners of Union County to purchase a site for a court house, and the habendum of the deed was: "Unto the said Commissioners of Union County and to their successors in office, in trust for the use of the county of Union forever." *Held*, That on the removal of the seat of justice and the discontinuance of the original uses for which the lots were conveyed, they did not revert back to the heirs of the original grantor. See also Kerlin vs. Campbell, 15 Pa. St., 500.

Barr vs. Weld, supra.

In Methodist Church vs. Old Columbia Public Ground Co., 103 Pa. St., 608, a conveyance of a piece of land in fee in trust for the sole use of a company, thereafter to be formed, for supplying a certain borough with water, was held not to constitute a base fee determinable on the cessation of the use of the premises for a reservoir, but that it passed a fee simple. Chief Justice Mercur there said: "Whatever words are relied on as creating a condition must not only be such as of themselves would create a condition, but must be so connected with the grant as to qualify or restrain it. Labarre vs. Carleton, 53 Me., 211. It was said by Mr. Chief Justice Bigelow, in Packard, et al. vs. Ames, et al., 16 Gray, 327: 'We know of no authority by which a grant declared to be for a special purpose without other words can be held to be a condition. On the contrary, it has always been held that such a grant does not convey a conditional estate unless coupled with a clause for the payment of money, or the doing of some act by the grantee, on which the grant is clearly made to depend.' To make the estate conditional the words must clearly show such intent. Cook vs.

Trimble, 9 Watts, 15. * * * *The authorities show that the recital of the consideration and a statement of the purpose for which the land is to be used are wholly insufficient to create a conditional estate.*"

In Wilkes-Barre vs. Wyoming Historical Society, 134 Pa. St., 616, it appeared that by Sec. 5, Act of April 5, 1870, P. L. 891, the borough of Wilkes-Barre was directed to convey to a historical society a lot fronting on a certain street "for the erection of a hall for the use of said society," was held to impose no condition upon the title directed to be conveyed. Mr. Justice Green there said: "As to the use of the lot expressed in the fifth section of the Act, it is only necessary to say that it is not restrictive of the grant, and that the title is not dependent upon a literal compliance with the use expressed. The Act simply says that the lot shall be conveyed to the defendant "for the erection of a hall for the use of said Wyoming Historical and Geological Society.' No condition of any kind was imposed. The passage of the title was not made to depend upon the performance of any terms. No direction was given that a hall should be erected and no penalty of any kind was established, whether by way of reverter of the estate or in any other manner whatever, for the non-erection of the hall. In these circumstances the authorities are uniform and very clear that no conditional estate is given, and the land can be held in fee simple without performance of the consideration or purpose expressed."

See also

Harris vs. Shaw, 13 Ill., 456.
Board vs. Pattenson, 56 Ill., 111.
Ayer vs. Emery, 14 Allen, (Mass.) 67.

"In grants from the crown and in devises a conditional estate may be created by the use of words which disclose that it is given or devised for a certain purpose, but such words do not make a condition when used in deeds of private persons—if one makes a

deed "with the intention or for the purpose," the words must be conjoined with words of forfeiture or clause of re-entry, or the grant will not be conditional."

Rewson vs. School Dist., 7 Allen, (Mass.) 125.

The words "in trust nevertheless and upon condition always" to use the premises for public worship, in a deed of land to a religious society do not necessarily create a condition, but may impart merely a trust.

Sohier vs. Church, 109 Mass., I.
Episcopal Mission vs. Appleton, 117 Mass., 326.

There are, however, no words in the deed to create a condition—neither *proviso, ita quod, sub conditione,* nor any equivalent for these usual if not indispensable words.

Perry vs. Scott, 51 Pa. St., 124.
Paschall vs. Passmore, 15 Pa. St., 295.

The plaintiff in error contends that where a grant is made for a particular use with the words "for no other purpose whatsoever" superadded, an estate upon condition is created. But passing the question whether they are sufficient in themselves to create a condition, they are in no way connected with the grant so as to qualify or restrain it. Labarre vs. Carleton, 53 Me., 211. Here the conveyance was to the trustees, "their heirs and assigns forever," the usual words used to grant a fee. The words "for no other purpose whatsoever" are not used in connection with the grant, nor do they in any way qualify it, but they are simply used to declare the uses for which the trustees should hold the fee previously granted. It was not intended to prevent its use or alienation for general purposes, but simply to prevent the trustees from using the land for individual purposes. It defines a duty of the trustees to the county, not to their grantors. Thus, in Griffits vs. Cope, 17 Pa. St., 96, a devise of land in fee, "there to build a meeting house upon, if the

members of that meeting shall agree to build a meeting house there, *but not else.*" The land was conveyed and the meeting house erected and used for more than a century. A new meeting house was then erected on other ground and the old one disused under a vote of the meeting and sold, but the sale was never consummated. Held, 1st. The devise was of a fee simple and not a qualified estate. 2d. That the trustees could sell and convey.

The Court there said: "There is a very palpable distinction between a gift of land from motives of charity and a dedication of land to charitable uses; and there are most intrusive reasons giving a judicial bias in favor of satisfying the motive without establishing a perpetual dedication.

"Our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraints upon alienation. And it seems unreasonable to suppose that a devisor ever means that his heirs shall get back the land in such cases, except when he says so; or that amidst the rapidly changing opinions of society, he means that his opinions shall be imbibed by others just as he left them, and shall forever withstand the changes necessarily incident to the progress of society, or that he means that no change in the number, circumstances and habits of the people shall ever justify any sort of conversion of the gift.

"It would seem contrary to public policy to favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied. * * * * * * * *

"These grants are as between the grantor and grantees fees simple, and as between the trustees and beneficiaries they are trusts."

See also Brendle vs. Church, 33 Pa. St., 415.

The distinction between the cases relied upon by the plaintiff in error and the facts of the present case is apparent upon the surface. Thus, in Kirk vs. King, 3 Pa. St., 436, the operative words of the grant did not convey a fee, but the grant was expressly stated to be "for an English school house and no other purpose." And this case was overruled in Wright vs. Linn, 9 Pa. St., 433. In Sheetz vs. Fitzwater, 5 Pa. St., 126, a conveyance was made of a mill dam or pond of water and land for the use and service of a certain mill, "and for no other use whatsoever," and the grantor reserved certain rights to himself. In McKissick vs. Pickle, 16 Pa. St., 140, the deed contained an express clause of reversion to the grantor, his heirs and assigns, in the event that the premises should be used for a different purpose than that mentioned. In Henderson vs. Hunter, 59 Pa. St., 335, the language of the grant is "so long as they use it for that purpose and no longer, *and then to return back to the original owner.*" The Court properly holds that this is a *conditional limitation* and not an estate upon condition. A reading of this case demonstrates the necessity of words of forfeiture or re-entry in order to create a condition. All of these cases turned upon a precise limitation contained in the deed, accompanied the creation of the estate, qualified it and prescribed the bounds beyond which it should not exist. Here, however, as already stated, the deed conveys a fee simple to the trustees without any clause so connected with the grant as to qualify or restain it. No restraint was imposed on an alienation of the land. No clause provided for a forfeiture or termination of the estate in case the land ceased to be used for court house purposes. No right of re-entry was reserved by the grantors except the non-payment of quit rent, and the mention of the one cause for re-entry is certainly an exclusion of all other causes. *Expressio unius, exclusio alterius.* No technical words were used equivalent thereto or proper to create a condition. The authorities cited show that the statement of the purpose for which the land is to be used is wholly insuf-

ficient to create a conditional estate. And this statement only had reference to the uses for which it was to be held by the trustees as between them and the people of the county.

In Slegle vs. Lauer, 148 Pa. 244, the Court distinguishes the case of Seebold vs. Shittler, 34 Pa. 137. For the same reason it must distinguish the present case.

In Seebold vs. Shittler, the Act of Assembly directs that a deed in fee simple shall be tendered to the Commissioners for the land which they were authorized to take for a court house, and the Court says that "no conveyance for any less estate or for a limited fee, and confined with conditions or qualifications of any kind, would have fulfilled the requirements of the legislature. A precisely similar state of facts exist in the case at issue. The original act creating the County of Northampton directs the parties therein named to "purchase and take assurance to *them and their heirs* of a piece of land, etc., in trust and for the use of the inhabitants of said county, to erect and build a court house." This authority was exercised by the said Trustees securing the tract of land now in dispute by a deed to *them and their heirs* in trust.

In addition to this, for the purpose of construing the deed of grant, attention is directed to the warrant upon which the deed is based, (Transcript, page 14.) The land is granted to the said trustees "for a court house for the use and accommodation of the inhabitants of the said town and county forever." It will be observed that absolutely no conditional words are here used. It was the intention of the grantor to grant and the grantees to receive a fee simple. The deed or patent is but a confirmation of the warrant and survey. Delaware and Hudson Canal Co. vs. Dunmock, 47 Penn. St., 393.

As already stated, the language of the deed to the trustees followed strictly the language of the Act of Assembly creating the county and which authorized the purchase. By the follow-

ing Act the title to all such property is vested in the county : "The titles to all and singular, the court houses, jails, prisons and work houses, together with the lots of land thereunto belonging or appertaining, in the several counties in this State, as they now are or heretofore have been, vested in any feoffees or trustees, or in the commonwealth or in the commissioners of the respective counties, or any bodies politic or corporate, for the several use of the said counties respectively, shall be, and they are hereby declared to be vested in the respective counties for the use of the people thereof, and for no other use."

Sec. 9, Act of April 15, 1834, Purd. Dig., (12th Ed.) p. 436.

II.

The deed created a trust in the nature of a charitable use not liable to be defeated by non-user.

We contend, moreover, that the deed having established a trust it was in the nature of a charitable use not liable to be defeated by *non-user*. The object of that conveyance was the erection of a court house for the public use and service of the people of the County of Northampton. Such a trust is included in the class of charities recognized by the law of Pennsylvania as entitled to especial protection, and not subject to be destroyed for *non-user*. This is the distinction between a conveyance on *condition* and a conveyance in *trust*. In Wright vs. Linn, 9 Pa. St., 438, it was stated that "every kind of legal public benefaction is included in the notion of a charity." Also, "That permanency is not necessary for a charity, and in order to make a conditional grant or a reverter such a condition should either *expressly appear or be unerringly indicated by the circumstances attendant on the gift.*" See also Fire Ins. Patrol vs. Boyd, 120 Pa. St., 624 ; Vidal vs. Girard, 2 How., 192, where the principles of the statute 43 Eliz., Ch. 4, relating to charitable uses were recognized as in force in Pennsylvania. In Att'y Gen'l vs. Hel-

lis, 2 Sim. & S., 67, a bequest of funds for the improvement of a town was held to be a charitable bequest. Sir John Leach said: "It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public or general purposes being within the equity of the statute. Thus a gift to maintain a preaching minister; *a gift to build a sessions house for a county*, etc., have all been held to be charitable uses within the equity of the statute of Elizabeth." In Coggeshall vs. Pelton, 7 Johns, Ch. 292, it was held that a legacy for erecting a town house for transacting town business was a charitable bequest. The case of Wright vs. Linn, supra, and In re. Mercer Home, 162 Pa. St., 232, cited by plaintiff in error for a contrary principle, do not sustain it. In the first named case, a conveyance of land to trustees to erect a school house was held to create a charity which was not divested by non-user for more than seventeen years and a re-entry by the grantor. And in the latter case a devise for a home for disabled clergymen, without any remainder or reversion after the charitable use, was held to pass the fee, and that the heirs of the devisor had no interest, direct or remote, in the property. The deed here in controversy vested a fee in the trustees without limitation, simply naming the trustees, "their heirs and assigns forever, in trust nevertheless for erecting thereon a court house, etc."

In this respect it is identical in principle with Barr vs. Weld,

A conveyance of land to trustees and their successors in office forever in trust for a use which is a charity to continue perpetually, will pass a title in fee simple, notwithstanding the absence from the deed of any words of inheritance.

Such a conveyance for a charatable use does not create a conditional estate, but a trust for the charitable use, not liable to be defeated by non-user or alienation.

Petition of Sellers M. E. Church, 139 Pa., 61.

The doctrine of *cy-pres* is in force in Pennsylvania.

Act May 26, 1876, Purd. Dig., 12th Ed., 302.

III.

Forfeiture of condition, if any, was waived, and right of action is barred by statute of limitations.

In the history of the case in the brief for plaintiff in error it is stated: "Between the years 1763 and 1766 a court house was erected on the lot which was used by the county until 1862, when it was torn down and the place where it stood has since been used as an open square by the City of Easton." The latter part of this statement we deny. Since it has ceased to be used for court house purposes it has been enclosed by an iron fence, a fountain costing several thousand dollars erected thereon, and the same has been in the open, notorious, adverse, continuous and exclusive possession of the City of Easton. In plaintiff's Exhibit No. 6 (transcript record, page 25,) appears the following admissions of fact: "That the Northampton county court house was erected upon said property between the years 1763 and 1766, and remained upon the lot from that time until 1862, in which year it was removed and no other buildings have been erected thereon since," and that a re-entry was made on behalf of the plaintiff on July 25, 1888. We have, therefore, an admission of record that for twenty-six years after the alleged breach of condition the plaintiff acquiesced in the same. The doctrine that a forfeiture may be waived by the party who has the right to avail himself of the breach of a condition and that he may do this by acts as well as by express agreement is a familiar one. Sharon Iron Co. vs. City of Erie, 41 Pa. St., 341. And in Wilson vs. Guthrie, 2 Grant, 110, a much shorter period was held to be "equivalent to an abandonment of the right of forfeiture."

Admitting, however, that the deed created a condition, and that there was a breach of it, the right of action of the plaintiff

is barred by the statute of limitations. In ejectment, the burden rests upon the plaintiff to show a good and sufficient title, for the defendant is presumed to be the owner until the contrary appears. 2 Troubat & Haly's Practice, § 1860. Here we have the admission that a breach of condition, if any, occurred in 1862, and no entry for breach until 1888. This is too late, for the Pennsylvania Act of Assembly expressly limits such actions to a period of twenty-one years after such right of action accrued.

Sec. 2, Act March 26, 1785, Purd. Dig., 12th, Ed., 1209.

"From henceforth no person or persons whatsoever shall make entry into any manors, lands, tenements or hereditaments after the expiration of twenty-one years next after his, her or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or action, for any manor, lands, tenements or hereditaments, of the seisin or possession of him, her or themselves, his, her or their ancestors or predecessors, nor declare or allege any other seisen or possession of him, her or themselves, his, her or their ancestors or predecessors, than within twenty-one years next before such writ, action or suit so hereafter to be sued, commenced or brought."

1.—Taking up the argument of the plaintiffs on this point—the doctrine of notice—if the estate is one upon condition, then it is determined by a breach of the condition and the right of entry as well as of action begins with such breach. The breach of the alleged condition occurred in the year 1862 by the cessation of the use of the court house and by the demolition of the same. No act of the tenant could be more unequivocal. Neither in Pennsylvania or elsewhere is it necessary for the tenant to give notice of the purpose of such act to the landlord. The title of the plaintiff accrued with the breach of condition, and from that time the statute of limitation began to run. The statute expressly provides that "*no entry shall be made twenty-one years after the right accrued.*"

2.—The plaintiff states, as one of the reasons why the statute of limitations will not apply, that their right did not vest until the death of the prior tenant, Thomas Gordon Penn, in 1869. A sufficient answer to this is that the statute having begun to run in 1862, during the life time of the prior tenant, the running of the statute did not cease by his death, but continued to run, having once inured, until the full twenty-one years had expired, unless prevented by some overt act of the landlord, which did not occur until the entry in 1888.

The right to plead the statute of limitations is a privilege of the defendant in every case. This being an action of ejectment, the statutory plea is "not guilty," under which the defendant can take advantage of the statute of limitations. (Troubat and Haley Practice, Sec. 1854.)

It being admitted in "Exhibit No. 6," which is a part of the plaintiff case, "that the court house was removed in 1862 and no other buildings erected thereon since," the facts were before the Court below and are now properly before this Court upon which it may pass upon the point that the plaintiff's title is barred by the statute of limitations.

The statement of the plaintiff in his brief that "he lived abroad and never heard of the action of the grantees until immediately prior to his entry and action," is no legal answer to the right of the defendant in error to take advantage of the statute. He cannot plead his own laches.

The plaintiff states that the re-entry was made July 25, 1888, and the action commenced July 26, 1888, and then cites an authority that the statute of limitations does not run against a remainderman until the right of entry accrues. The *right of entry* accrued in 1862. The entry itself was not made until 1888. The statute runs against the plaintiff. "The statute of limitations affects by its bar, not only the tenant in tail, but the remainder-

When the right of a tenant in tail of any land or ground rent, to make an entry or distress, or to bring an action to recover the same, shall become barred by reason of the same not having been made or brought within the period limited by law, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred; And whensoever the statute of limitation shall have begun or shall begin to run against the tenant in tail, it shall continue to run against the issue, remainderman or reversioner, unless arrested by the act of the tenant in tail: Provided, that no person shall be barred or affected by force of this act until after the expiration of three years from the date thereof.

Act of 13 April, 1859, Purdon Dig., 1213.

The plaintiff states that the common law rule [illegible] by statute in some States, but not in Pennsylvania." It will be observed that the alleged common law rule, then, has been altered by the above statute in Pennsylvania, and, therefore, his argument upon this point fails.

4.—The plaintiff further contends that the statute of limitations does not run against the proprietaries on the ground that their proprietary rights and estates were expressly preserved to them by the Divesting Act. The section of the Act of 1779, known as the Divesting Act, reserves to the proprietaries their "private estates, lands and hereditaments whereof they were possessed or to which they are entitled in their several right or capacity by devise, purchase or descent, and likewise all the lands called and known by the name of the proprietary tenths or manors which were duly surveyed and returned to the land office before July 4th, 1776, etc."

At the time of the enactment of this act the proprietaries were aliens and it was within the power of the State of Pennsylvania to confiscate all their property, title and interest within the Commonwealth. Instead of so doing, the Legislature, while divesting the proprietaries of public titles, estates, interests,

reserved to them the titles and rights to their private estates or manor lands. Because of this exception and liberal act of the Legislature the claim is now set up that the rights of the proprietaries are equal to the Commonwealth in said manors and private estates, and that therefore the statute of limitations cannot run against the Penns and their heirs.

This cannot be the law. It certainly would not comport with the dignity of the Commonwealth of Pennsylvania that the representatives of private estates should successfully maintain that the Statute of Limitations could not be invoked against them—a doctrine which is the privilege of sovereignty alone.

The estates of the proprietaries are subject to the same laws of property, rules of evidence and general principles of construction which govern all other estates in this commonwealth. If this were not the law, we would have this anomalous condition in the State of Pennsylvania—all the lands granted by the proprietaries and their heirs subject to an entirely different code of law than that applying to other lands in the State.

The plaintiff cites the case of Kirk vs. Smith, 9 Wheaton, (W. S.) 36, in support of his contention. A careful reading of this case warrants a different construction. The syllabus is misleading. Nowhere does the Court hold that the Statute of Limitations does not run against the proprietaries. It constantly maintains a contrary doctrine. The Court held that the statute was not operative in that case, because the land in dispute *was not held adversely* to the title of the Penns, the grantors. For this very reason, however, the statute is applicable to the present controversy. The land in question has been in the open, notorious, continuous and adverse possession of the City of Easton for more than twenty-one years—a fact which is admitted by the entry of the plaintiff and his subsequent ejectment by the defendants, (transcript of record, page 25.) The opinion of John-

son, J., in Kirk vs. Smith, applies in all its force to the present controversy.

In addition to this it is important at this juncture to observe that the land in dispute has not been since 1863, when the court house was removed, in the possession of the County of Northampton, but has been in the adverse possession of the City of Easton. Therefore any contention that a possession cannot be adverse if the defendant's entry was under a title derived from the plaintiff is not applicable.

A county may acquire title in this manner.

Schuylkill, &c., vs. McCreary, 58 Pa. St., 304.

The plaintiff further maintains that the right of entry existed until sufficient length of time had elapsed to presume final abandonment, and that seven years would be sufficient wherein to presume abandonment.

No authority is cited for this contention. The breach of condition is the basis of the right of entry. The statute itself fixes the beginning of the running of the statute as at the time when this right of entry accrued, namely the removal of the court house, which is the alleged breach of condition. We are here confronted with a fact and not with a theory of presumption.

IV.

A court house having been erected and used on the ground conveyed was a compliance with condition, if any.

The language of the deed in question, relied upon to create an estate upon condition, is as follows, viz: "In trust nevertheless, to and for the erecting thereon a court house for the public use and service of said county, etc." Now, it is a fundamental principle that all conditions must be strictly construed. Sharon Iron Works vs. Erie, 41 Pa. St. 341. The following is the rule laid down by Shaw, C. J., in Rawson vs. School Dist., 7

Allen, 125: "Such a condition when relied upon to work a forfeit is to be construed by the Court with great strictness, the demandant shall have his exact legal rights and no more" Admitting, therefore, that the deed did create an estate upon condition, it was complied with by "erecting thereon a court house." There is nothing in the condition that requires the court house to be rebuilt or maintained perpetually upon that particular spot. Such an intention ought to be clearly expressed, and not left to implication. It is admitted that a court house was erected and maintained thereon for a hundred years, but to make the condition perpetual there should be express words to that effect. Thus, in Mead vs. Ballard, 7 Wallace, 290, a condition that a certain institute should be permanently located upon the lands granted, before a certain date was held fulfilled, by the passage before the said date, by the governing body of the institute locating it in accordance with the terms of the deed, followed by building on the same land after the date fixed; and that although the institute was afterwards burned and was re-erected upon grounds other than those granted. Miller, J., in the course of the opinion of the Court, said, adverting to the condition: "Did this mean that all the buildings which the institution might ever need were to be built within that time, or did it mean that the officers were to determine in good faith the place where the buildings for its use should be erected? It is clear to us that the latter was the real meaning of the parties, and that when the trustees passed their resolution locating their building on the land, with the intention that it should be the permanent place of conducting the business of the corporation, they had permanently located the institute within the true construction of the contract. * * * We are of opinion that the testimony shows in any view that can be taken of it that the condition was fully complied with and performed, and with it passed all right of reversion in the grantor or his heirs." And in Griffits vs. Cope, 17 Pa. St. 99, the Court said, in construing a clause sought to be

made a condition: "It would seem contrary to public policy to favor a construction that would give to a man who died a hundred or a thousand years ago the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied."

It is scarcely necessary to occupy time and space in discussing the assignments of error to the offers of testimony made at the trial and rejected. No authorities are cited to sustain these offers, and it is submitted that none can be found even looking in that direction. They all relate to tracts of land other than the one now in controversy and therefore could have no possible bearing upon the present proceeding. These offers were properly rejected as collateral to the present inquiry.

The deed in question conformed strictly to the language of the Act of Assembly creating the county, which authorized the trustees to purchase land in fee for court house purposes, to be held by them in trust for the people of the county. It was executed and delivered by the Proprietaries of Pennsylvania, in colonial times, when the country was sparsely settled and when they were pecuniarily interested in enhancing the value of their other lands by the progress and prosperity of the infant colony. After thus securing the benefits of their grant, and after the lapse of a century and a quarter of time, it does seem contrary to public policy to permit this remnant of royalty to control land that ought to be controlled by the present generation. And it is unreasonable to suppose that even the grantors themselves intended that their heirs should get back this land, for they have failed to say so in express language. Such an intention should be clearly expressed and not left to doubtful implication. Bearing in mind the rapid changes in the circumstances, habits, opinions and institutions of our people since this grant was made, the wisdom of that rule of law which discourages the fettering of estates becomes all the more apparent.

AARON GOLDSMITH,
EDW. J. FOX,
For Defendants in Error.

APPENDIX.

The Opinion of the Circuit Court of Appeals—Third District.

ACHESON, Judge.—This was an action of ejectment by William Dugald Stuart, an alien and subject of the Queen of Great Britain, against the City of Easton and County of Northampton, corporations of the State of Pennsylvania.

The County of Northampton was laid out and erected by an Act of the General Assembly of the Province of Pennsylvania passed the 11th day of March, 1752, (1 Dallas' Laws, 452.) The sixth section of the act provided as follows: "And be it further enacted, that it shall and may be lawful to and for Thomas Craig, Hugh Wilson, John Jones, Thomas Armstrong and James Martin, or any three of them, to purchase and take assurance to them and their heirs, of a piece of land situate in some convenient place in the said town, (Easton), in trust and for the use of the inhabitants of said county, and thereon to erect and build a court house and prison, sufficient to accommodate the public service of the said county and for the ease and convenience of the inhabitants."

On the ninth day of July, 1762, Thomas and Richard Penn, the proprietaries of Pennsylvania, caused to be issued a warrant of survey, which, after reciting the above mentioned act, proceeded thus: "And whereas on application and request of said trustees, and out of regard to encourage and promote the improvement of the said town and general good and convenience of the inhabitants of said county, we have condescended and agreed to grant to the said trustees a lot or piece of ground of eighty

feet square to be laid out in the centre of the great square in the middle of the said town of Easton, for a court house for the use and the accommodation of the inhabitants of the said town and county forever;" and the warrant then directed the Surveyor General to survey and lay out the said described lot of ground "for the public use of a court house for the inhabitants of the said town and county."

This warrant having been duly executed and returned into the land office, a patent was issued on the 28th day of September, 1764, by the proprietaries, to the named trustees for said lot. After reciting the Act of Assembly and the warrant of survey, the patent proceeds thus: "Now, know ye, that for the further encouragement and better promoting the public benefit and service of the said town and county, and for and in consideration of the yearly quit-rent (one red rose) hereinafter reserved and of the sum of five shillings to us in hand paid by the said trustees, the receipt whereof is hereby acknowledged, we have given, granted, released, and confirmed, and, by these presents, do give, grant, release and confirm unto the said trustees, John Jones, Thomas Armstrong, James Martin, John Rinker and Henry Allshouse, and their heirs, the said lot of ground, situate in the center of the great square in the said town of Easton, containing eighty feet in length north and south, and eighty feet in breadth east and west; . . To have and to hold the said hereinbefore described lot of ground, with the appurtenances, unto the said John Jones, Thomas Armstrong, James Martin John Rinker and Henry Allshouse, their heirs and assigns forever; in trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent or purpose whatsoever."

By virtue of an Act of Assembly approved April 15, 1834, (P. L, 538) the title of the trustees became vested in the county of Northampton.

The Northampton county court house was erected upon the said lot of ground between the years 1763 and 1766, and remained upon the lot from that time until 1862, in which year it was removed, and no other buildings have been erected thereon since.

On the 25th day of July, 1888, William Stuart, who was the heir at law of Thomas and Richard Penn, caused an entry to be made on the said lot of ground for breach of the condition subject to which, it is alleged, the lot was granted by the above recited patent, and subsequently he brought this action of ejectment for the recovery of the lot.

William Stuart having died after the commencement of the suit, his son, William Dugald Stuart, who succeeded to all the rights of the said William Stuart in and to lands in Pennsylvania, was substituted as plaintiff.

Under the instructions of the court below there was a verdict for the defendants, and afterwards judgment was entered in their favor.

The position taken by the plaintiff in error is, that the grant of September 28, 1764, by Thomas and Richard Penn to John Jones and others "their heirs and assigns forever, in trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent or purpose whatsoever," did not pass an estate in fee simple, but only a conditional estate determinable on the cessation of the use of the lot of ground for the designated purpose. Is this a sound view of the conveyance?

It is to be observed, that the deed from the Penns recites as the occasion of the grant the Act of the General Assembly under which, as we have seen, John Jones and others were empowered "to purchase and take assurance to them and their heirs" of a piece of land "in trust and for the use of the inhabitants of said county," and thereon to erect a court house "for the ease and

convenience of the inhabitants." Undoubtedly, the Act of Assembly contemplated the acquisition of an estate in fee simple only, by the appointed trustees. Now, the conveyance by the Penns is to the named persons, "their heirs and assigns forever." The succeeding words, in trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the said county and to and for no other use, intent, or purpose whatsoever," define the relation between the grantees and the inhabitants of the county of Northampton, and restrain the grantees from any other application of the property than to the avowed object of the grant. The words of the deed are apt words to pass a fee simple estate as between the grantors and the grantees, and to create a trust as between the grantees and the beneficiaries. There is here no express provision for forfeiting the estate for non-user, nor is any right of re-entry expressly reserved to the grantors or their heirs in the event of the cessation of the use of the lot for the designated purpose. The object of the grant was the public benefit and service of a growing community throughout all future changes in the condition and circumstances of that community, and the purpose of the grant could be subserved best by the conveyance of an absolute estate. In the absence, then, of express stipulation, is it to be supposed that the grant of a conditional estate determinable by re-entry upon non-user was intended?

In Wright vs. Linn, 9 Pa., 433, where land was conveyed to certain named persons and their successors in trust, to erect a school house for the perpetual use of the parties to the deed and other designated persons, it was held that a charity was created which was not determined by non-user for more than seventeen years after a school house had been erected and used, and a re-entry by the grantor. In McKissick vs. Pickle, 16 Pa., 140, 148, the court declared: "The grant, being for a charity, could not be forfeited for non-user, nor for mis-user, except under an express condition or contract." And the court further said: "The law raises every intendment in favor of a charity against

the grantor or those claiming under him." In Griffiths vs. Cope, 17 Pa., 96, 99, in construing a devise to charitable uses, the court said: "Our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraints upon alienation, and it seems unreasonable to suppose that a devisor ever means that his heirs shall get back the land in such cases, except when he says so. . . . It would seem contrary to public policy to favor a construction that would give to a man, who died a hundred or a thousand years ago, the control of land that ought to be controlled by the present generation. Such an intention ought to be expressed, not implied." In Barr vs. Weld, 24 Pa., 84, 87, where a conveyance was "in trust for the Utica school house" the court said: "There is no express condition or contract giving to the grantor or his heirs the right to enter for condition broken or for misuser. He had therefore no right to maintain an ejectment, and the plaintiff claiming under him is in the same predicament." In re Mercer Home, 162 Pa., 232, 238, where a testatrix devised a farm to a charitable use as a home for disabled clergymen, and directed that no part thereof "shall be sold or disposed of, incumbered or applied to any other use or purpose than as a home for disabled clergymen of the Presbyterian faith as above specified," it was held, that, as the testratrix created no remainder or reversion, the charity took an estate in fee simple; that the heirs of the testratrix had no interest direct or remote in the property; and that nothing short of a plain, unequivocal direction that no part of the land should be parted with for any purpose whatsoever, ought to be held sufficient to restrain the managers from doing that which the interest of the charity under their control required of them.

These decisions of the Supreme Court of Pennsylvania are conclusive, we think, against the claim of the plaintiff in error, if as is contended by the defendants, the grant by the Penns was for a charitable use. To the question, then, whether the use

designated in and by the deed of September 28, 1764, is of a charitable nature, we now direct our attention.

Although the statute of 43 Eliz. ch., 4, concerning charitable uses was not adopted by the colony or State of Pennsylvania, still the principles of it as applied by Chancery in England always have obtained here by force of the common law of the State: Witman vs. Lex, 17 Ser. & R., 88. This was clearly shown by Mr. Justice Baldwin, (sitting at circuit in this State) in his learned opinion upon charitable uses in the case of Magill vs. Brown, Brightly's R., 347; 16 Fed. Cas., 408, which arose under the will of Sarah Zane, wherein also he demonstrated, that the whole course of the common law of England, except as modified for special purposes of policy by the statutes of mortmain and superstitious uses, was favorable to charities. And in Ould vs. Washington Hospital for Foundlings, 95 U. S., 303, 309, 311, the Supreme Court of the United States declared, that the statute of 43 Eliz. ch., 4, was purely remedial and ancillary, and that the validity of charitable endowments and the jurisdiction of courts of equity over them do not depend upon that statute.

Now, in Jones vs. Williams, Amb., 651, Lord Camden defined a charity to be, "A gift to a general public use which extends to the poor as well as the rich;" and a bequest of a fund to be applied to water-works for the use of the inhabitants of a town was there recognized as for charitable use. In House vs. Chapman, 4 Ves. Jr., 542, 551, it was held, that a bequest for the improvement of the City of Bath was a charitable bequest. In British Museum vs. White, 2 Sim. & S., 595, a devise to the British Museum was adjudged to be for a charitable use. In Attorney-General vs. Heelis, 2 Sim. & S., 67, 76, where a part of a common was dedicated for paving, lighting, cleansing, and otherwise improving a town, the funds derived therefrom were held to constitute a charity. And the Vice Chancellor (Sir John Leach) there said: "I am of opinion that funds supplied from the gift

of the crown, or from the gift of the legislature, or from private gift, for any legal, public or general purpose, are charitable funds to be administered by courts of equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, all other legal, public or general purposes being within the equity of that statute. Thus, . . . a gift to build a sessions house for a county, a gift by parliament . . . for the purpose of rebuilding St. Paul's Church, after the fire in London, have all been held to be charitable uses within the equity of the statute of Elizabeth."

These English cases are cited with approval in the opinion of the Supreme Court of Pennsylvania in Wright vs. Linn, supra, and the deduction therefrom made, "that every kind of legal public benefaction is included in the notion of charity."

In Coggeshall vs. Pelton, 7 Johns, Ch. 292, a pecuniary legacy to the town of New Rochelle, for the purpose of erecting a town house for transacting town business, was held to be a valid charitable bequest. In Magill vs. Brown, supra, a bequest to a town for a fire-engine and hose was sustained as for a charitable use. These two latter cases were cited with approval in Cresson's Appeal, 30 Pa., 437, 450, wherein it was held that a legacy, the income of which was to be "annually forever expended in planting and renewing shade trees especially in situations now exposing my fellow citizens to the heat of the sun," and a legacy "to endow a professorship of the fine arts" in the University of Pennsylvania, were good bequests to charitable uses. The Court there said: "Charity has been defined to be a general public use. Amb. 651."

In Fire Insurance Patrol vs. Boyd, 120 Pa. 624, 644, 645, it was held, that the Fire Insurance Patrol of Philadelphia, a corporation to save life and property in and contiguous to burning buildings, being without money capital, but supported by voluntary contributions of fire insurance companies, making and dividing no

profits and saving property, whether insured or not, is a public charity. In the course of its opinion the Court approved Lord Camden's definition of a charity expressed in Jones vs. Williams, supra, and also quoted approvingly the definition of a charity formulated by Mr. Justice Gray in Jackson vs. Phillips, 14 Allen, 539, 556, as follows: "A charity in legal sense may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings, or works, or otherwise lessening the burdens of government."

In Perin vs. Carey, 24 How., 465, 506, the Supreme Court of the United States said: "All property held for public purposes is held as a charitable use in the legal sense of the term charity." And in Ould vs. Washington Hospital for Foundlings, supra, the Court declared: "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man."

Guided by the foregoing authorities, we confidently reach the conclusion that the grant by the Penns of the lot of ground in controversy in trust for the erection thereon of a court house for public use and service of the County of Northampton was a grant for a charitable use in the legal sense. Now, as we have already seen, the deed of conveyance contains no express provision for a forfeiture or reverter to the grantors or their heirs in the event of non-user or mis-user, and, in the absence of such express provision, no right or re-entry to defeat the charitable use is to be implied. It follows, therefore, that the plaintiff was without title to maintain this ejectment. For the non-use or mis-use of the trust property the County of Northampton is answerable

only to those immediately interested in the trust or to the Commonwealth of Pennsylvania. Barr vs. Weld, supra; Vidal vs. Girard's Executors, 2 How., 127, 191; In re Mercer Home, supra.

The Court below was right in instructing the jury to find a verdict for the defendants, and accordingly the judgment is affirmed.

May, 1896.